COURT'S ORDER WHETHER THE CASE IS OR IS NOT APPROVED FOR REPORTING

[Chapter VIII, Rule 32(2) (b)]

Description of Case.

A.O. No.495 of 2001
(Old No. F.A.F.O. No. 713 of 1990)

National Insurance Co. Ltd.

Versus

Smt. Luxmi Devi and others

A.F.R. (Approved for Reporting)
~~Not Approved for Reporting~~

(B.S. Verma, J.)

Date: 2-11-2006 ***Initials of Judge***

Reserved Judgment

THE HIGH COURT OF UTTARANCHAL AT NAINITAL.

A.O. No. 495 of 2001

Old F.A.F.O.No. 713 of 1990

National Insurance Co. Ltd. having its Divisional Office at Mahatma Gandhi Marg, Allahabad through its Senior Divisional Manager.

… **Appellant.**

Versus

1. Smt. Luxmi Devi aged about 32 years, widow of Sri Ram Singh Choudhary,
2. Sri Prem Prakash aged about 11 years minor son of late Ram Singh Choudhary,
3. Km. Sarita aged about 7 years minor daughter of Late Ram Singh Chaudhery.
4. Km. Rekha aged about 7 years minor daughter of late Ram Singh Choudhery.

   Respondents no. 2 to 4 are under the guardianship of their mother Smt. Luxmi Devi and O.Ps. No 1 to 4 are resident of village Naila, Patti Malla Silore, P.O. Abhajari, Tahsil Ranikhet, District Almora.
5. Sri S.K.S.Bindra Transport Haldwani, District Nainital, Owner of Truck No. 9544.
6. Sri Jitendra Kumar Sahu S/Ok Sri Gurudas Sahu, R/O Sudershan Hotel, Tallital, Nainital. Owner of Bus No. 9879 (Opposite Parties)

… **Respondents**

Sri D.S.Patni, learned Counsel for the appellant-Insurance Company.
Sri G.B.Pande, learned counsel for the claimant-respondents.
Sri Harsh Vardhan Sah, learned counsel for the respondent no.6.

Date November 2, 2006.

P.C : Hon. B.S. Verma, J.

This appeal under Section 173 of the Motor Vehicles Act 1988 (***for short the Act***) is directed against the judgment and award dated 31-3-1990 passed by the District Judge/Motor Accident Claims Tribunal, Almora (***in short the Tribunal***), in Motor Accident Claim Case No. 101 of 1986, Smt. Laxmi Devi and others Vs. S.K.S. Bindra and others, whereby the claim petition was decreed for compensation of Rs. 1,17,400/- in favour of the claimants and against the owner, insurer and driver of the truck in question along with interest @ 12% per annum as mentioned in the impugned award.

At the outset, it may be mentioned that the accident in question was caused due to collision of two motor vehicles, namely Truck No. U.R.N.-9544 and passenger bus No. URN-9879. O.P.No.1 S.K.S. Bindra is the owner of Truck No. U.R.N. 95-44, appellant-Insurance Company is the insurer of the said truck and O.P.No.5 Bahadur Singh was driver of the truck in question. The passenger bus belonged to Jitendra Kumar Sah, which was being driven by Kishan Singh, O.P.No.6 and it was insured with M/s United India Insurance Company.

Relevant facts necessary for a just decision of the appeal are that on Ram Singh Chaudhary, husband of claimant no. 1 Laxmi Devi, lost his life as a result of injuries sustained by him in a motor accident, which occurred on 18-6-1986. According to claimants the deceased started journey between Jalali-Masi Octroi and Panghat in Truck No. URN-9544, which was being driven rashly and negligently by its driver. When the truck reached near Saraswati Woollen Mill, it collided with passenger bus no. URN-9879, which too was being driven rashly and negligently by its driver, as a result of which the truck fell down in the Khadd and Ram Singh Choudhary sustained fatal injuries. He was rescued to Civil Hospital Ranikhet, where he succumbed to his injuries on the next day. The deceased Ram Singh Chaudhary was a government servant and was working as peon in the agriculture department at Nainital. The claimants being the widow and minor children of the deceased, preferred the claim petition for compensation of Rs. 1,50,000/- on different counts as mentioned in the claim petition.

Initially, the claimants made the owners and the insurers of the two vehicles as opposite parties. On the finding of the learned Tribunal on Issue No. 3 and consequent direction to the claimants, the respective drivers of the two vehicles were arrayed as O.P.Nos.5 and 6 to claim petition. The O.P.No.1 S.KS.Bindra, owner of the offending Truck, denied the negligence in driving on the part of the truck driver, rather he imputed the negligence on the part of driver of

the bus. In the alternative, it was asserted that the truck was comprehensively insured with M/s National Insurance Company Ltd., therefore, the liability if any, rests upon the insurance company. Quantum of compensation was also questioned.

The insurer for the truck-appellant filed its written statement and contested the claim petition. According to it, the deceased could not have been a bona fide passenger in the truck, i.e. goods vehicle, which is not meant for carrying passengers for hire or reward. It was contended that the deceased was not an employee of the truck owner. The liability of O.P. No.1 for compensation was denied by insurance company. In the alternative it was alleged that the petition was barred by limitation against the Insurance Company-appellant.

The owner of the passenger bus has asserted that the driver of the truck in question was negligent in driving the motor truck and there was no negligence on the part of the bus driver. It was contended that the bus was coming upward at low speed on its left side. On the contrary, the motor truck was being driven rashly and negligently. In the alternative, it was asserted that the bus being duly insured, insurer of the bus was liable to pay the compensation, if any.

The driver of the passenger bus filed his written statement took the same stand as was taken by the owner of the bus. It was also contended that he has informed the police about the accident in question.

The insurer of the bus, M/s United India Insurance Company asserted that the accident was caused by the driver of the truck, who was driving the vehicle rashly and negligently, while the passenger bus was being driven at slow speed carefully and cautiously. It was also contended that the driver of the two vehicles

did not possess valid driving licence, therefore, the insurance company was not liable for compensation.

The driver of the truck Bahadur Singh did not put in appearance despite sufficient service to contest the claim petition. No written statement was filed by him, hence the case proceeded ex parte against him.

On the above pleadings of the parties, the following issues were framed by the learned Tribunal:-

1. Whether truck no. URN-9544 was insured, under commercial vehicle policy, and the said truck was insured for carrying passengers? If not, its effect?

2. Whether the deceased Ram Singh Chaudhary was neither an employee of the owner of the truck nor was he a labourer for the loading or unloading of the truck?

3. Whether non-joinder of the driver vitiated the claim of the petitioners?

4. Whether O.P.No.2 is not liable to pay compensation in terms of insurance policy?

5. Whether the accident occurred due to rash and negligent driving of the bus and truck in question or both?

6. To what amount of compensation, the petitioners are entitled and from which of the O.Ps.?

7. Whether the compensation of Rs. 15,000/- is payable as provided under Section 92-A of the Motor Vehicles Act? If so, by whom?

8. Whether the driver of motor truck No. URN-9544 did not possess driving licence for hill region? If so, its effect?

9. Whether persons including the deceased were being transported in the motor truck No. URN-9544 in violation of the terms and conditions of the insurance policy? If so, its effect?

Learned Tribunal recorded the evidence led by the parties, heard them and after perusing the evidence on record, the learned Tribunal decided Issue no.3 and 7. On Issue No. 3 it was held that the claim petition had not vitiated for non-joinder of driver of the vehicle. The claimants were directed to implead the drivers of both the vehicles as opposite parties and the drivers Bahadur Singh and Kishan Singh were impleaded as O.P.Nos. 5 and 6. On Issue No.7, it was held that the claimants are entitled to interim

compensation of Rs. 15,000/- payable by the owners of both the vehicles as well as the insurers thereof, O.P. Nos. 3 and 4.

Learned Tribunal took up Issue No.5 for decision and after discussing the entire evidence elaborately, found that the accident occurred solely on account of rash and negligent driving of the tuck No. URN-9544 by its driver Bahadur Singh. The learned Tribunal took up all other five issues together for decision, namely, Issue Nos. 1, 2, 4, 8 and 9. The learned Tribunal ultimately held that the illfated motor truck was insured for carrying two non-fare paying passengers as well, that although Ram Singh Chaudhary was neither an employee of the insured owner of the truck nor was he a labour for loading or unloading the truck, he was clearly covered by the Insurance provided by the said insurance policy, and that Ram Singh Chaudhary was not being transported in the illfated motor truck in violation of any terms and conditions of the Insurance Policy. It is also to be held that the insured in respect of the present claim laid by the heirs of Ram Singh Chaudhary, who had died in the accident, which was caused due to negligence on the part of the driver of the insured motor vehicle. The learned Tribunal lastly took up Issue No.6 and after dealing the entire material on record on the point of quantum of compensation and thrashing the evidence on record, the learned Tribunal came to the conclusion that the claimants were entitled to compensation of Rs. 1,17,400/- along with interest @ 12% per annum. It was held that the driver of the truck Bahadur Singh is primarily liable in the said compensation. It was concluded that all the three opposite parties, the owner, insurer and driver of the are liable in said compensation jointly and severally and the claim petition was decreed accordingly by the impugned award dated 31-3-1990.

The appellant-Insurance Company has assailed the impugned award mainly on the ground that the driver of the truck in question was not holding a valid driving licence; that there was

contributory negligence on the part of drivers of both the vehicles, which collided in the accident and that the finding of the Tribunal fastening liability to pay the compensation of more than Rs. One lac upon the insurer is against the terms of the policy. On the other hand, the learned counsel for the claimant-respondents has submitted that the findings recorded by the Tribunal are fully supported by the evidence on record.

I have heard rival contention of learned counsel for both the parties and perused the evidence on record including the lower court record.

So far as the findings of the Tribunal having been challenged on the point of negligence including the contributory negligence is concerned, it may be mentioned that the Insurance Company has not obtained permission of the learned Tribunal under Section 110-C(2-A) of the Motor Vehicles Act 1939, which corresponds to Section 170 of the new Act of 1988. Moreover, there is no such finding of the Tribunal that the claim petition has been filed in collusion between the claimant and the person against whom the claim has been made. The insurance company can challenge the award on the limited scope available under Section 149 of the Act. In such circumstances, it is not open to the Insurance Company to challenge the award passed by the Tribunal on the point of negligence or contributory negligence and also on the quantum of compensation in view of the law laid down by the Apex Court in the case of ***"National Insurance Company Ltd. Vs. Nicolletta Rohtagi and others"[(2002) 7 S.C..C. 456].*** The appeal is not maintainable on this score. In that case, it has been observed that ***"even if no appeal is preferred under Section 173 of 1988 Act by an insured against the award of a Tribunal it is not permissible for an insurer to file an appeal questioning the quantum of compensation as well as findings as regard negligence or contributory negligence of the offending vehicle."***

So far as the contention that the driver of the truck in question was not having a valid driving licence is concerned, it is clear from impugned award that the learned Tribunal has dealt with this matter in paragraph 26 and it has dealt with the matter vis-à-vis the provisions of Section 96 of the Old Act. The Apex Court in the case of ***"Punam Devi and another Vs. Divisional Manager, New India Assurance Co. Ltd. and others" [(2004) 3 Supreme Court Cases, 386],*** observed that ***"Motor Accident- Insurance company neither pleading nor leading evidence that the offending driver had no licence- Claims Tribunal awarding compensation- Held, quantum of compensation cannot be challenged and the only ground open to the Insurance Company is under S. 149(2), to show that the insured was negligent or that he failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of the vehicles- Since the Insurance Company failed to discharge this burden, High Court erred in allowing the appeal."***

The learned Tribunal after having scrutinized the material on record has come to the conclusion that the insurer cannot avoid it liability on the present action on the plead that the driver of the illfated motor truck did not possess driving licence duly endorsed for hill region. Moreover, the Apex Court has held in paragraph 110(iii) of the judgment in the case of ***National Insurance Co. Ltd. Vs. Swaran Singh*** reported in [(2004) 3 Supreme Court Cases, 297], as under:-

> ***"The breach of policy condition, e.g., disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of section 149, have to be insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To***

avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time."

I may further add that the Insurance Company has examined one Neeraj Kumar, D.W.1, Regional Manager in the Lucknow Regional Office of the National Insurance Company before the learned Tribunal. In the cross-examination, D.W.1 has clearly admitted that a survey was conducted regarding the accident in question from the surveyor and on the basis of the survey report, the truck owner was paid compensation of Rs. 39000/- for the damages caused to the truck. The learned Tribunal has elaborately dealt with the matter of validity of driving licence at page nos. 12 to 18 in paragraphs nos. 26 and 27 of the impugned judgment. The learned Tribunal has rightly held in the concluding lines of page no. 18 that *"it was for the insurer, therefore, to lead positive evidence to prove that there existed such a condition in the insurance policy excluding the diving of the illfated motor truck unless the licence of the driver was duly endorsed for hill region, and that the said condition has been breached." It was further held that "no positive evidence has been led to prove the alleged breach of the said condition."* The learned Tribunal further dealt with the point of policy conditions from paragraph nos. 26 to 30 running from page nos. 12 to 21 and ultimately observed that ***"it cannot be said that the insurer, the O.P.No.2, has discharged its burden to prove any condition in the insurance policy excluding driving of a transport vehicle in the hill region by a driver whose driving licence was not duly endorsed by the concerned authority permitting him thereby to drive such vehicle on hills roads. That being so, there is no question of any breach of any such condition of the insurance policy. Assuming that such condition did exist, the insurer has failed to prove its breach by leading positive evidence, for which the burden lay upon***

it." A perusal of the impugned award clearly reveals that the learned Tribunal has considered each and every aspect of the case in arriving at the conclusion that the Insurance Company could not prove breach of any of the policy conditions so as to absolve it from the liability of compensation.

Now, the only question to be answered in the appeal is whether under the insurance policy, the insurer was liable to pay compensation up-to Rs. 20,000/- only. It is pertinent to mention that in the written statement filed by the owner of the truck it has been clearly stated that the liability of the insurer was unlimited vide policy no. 6307327. The copy of the Insurance Policy, Ext.A-1 on record also shows that extra premium of Rs. 150.00 was charged by the insurance company towards unlimited third party (U.L.T.P.) risk. It may be mentioned that neither in the written statement filed by the appellant-insurance company nor in the oral testimony of the then Branch Manager of the insurance company, who has been examined in the witness box as D.W.1, no where it has been stated that the liability of the insurance company was limited to Rs. 20,000/- and it was for the first time in appeal this stand was taken by the appellant. It may also be mentioned that the Insurance Company-appellant had participated in the proceedings from the beginning to the conclusion of the case before the Tribunal. The Insurance Company never took the plea that its liability was limited to the extent of Rs. 20,000/-, probably because the appellant-company knew very well that the policy in question is a Comprehensive Policy and the liability of the insurer was unlimited because extra premium of Rs. 150/- was charged against the insured-owner. The learned Tribunal has categorically given its finding upon the liability of the insurer in paragraph no. 32 of the impugned judgment on the basis of the insurance policy (Ext. A-1), which need not be reiterated here and it would suffice to mention that the findings of the learned Tribunal are well reasoned and elaborate based on proper appreciation of evidence on all the points in dispute.

In view of the discussions aforesaid, there is no force in the appeal preferred by the insurance company. I do not find any infirmity or illegality in the impugned award passed by the learned Tribunal. The appeal deserves to be dismissed outright.

The appeal is dismissed. The judgment andward under appeal is upheld. Costs easy.

The amount in deposit with this Court, if any, be remitted to the Motor Accident Claims Tribunal concerned for being paid to the claimants.

(B.S. Verma, J.)

RCP